IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 548 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHUPATJI SHAKARAJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 548 of 1997
MR DIPAK R DAVE for Petitioner No. 1
Mr K C Shah, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 08/05/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

This is an appeal filed by the appellant-convict under sub-section (2) of section 374 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), read with section 36B of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short, 'the NDPS Act') against the judgment and conviction order dated 28.4.1997 recorded by the learned Addl.City Sessions Judge, Court No.15, Ahmedabad City in Sessions Case No.96/96 under which the learned Judge convicted the present appellant for offence punishable under sections 21 and 22 of the NDPS Act and sentenced him to suffer R.I. for 10 years. A fine of Rupees One lakh was also imposed by the learned trial Judge. In default of payment of fine, the appellant was required to undergo further imprisonment for one year.

2. The case of the prosecution before the trial court was that on 10.12.1995, Police Inspector, K C Bava working in Crime Branch at Ahmedabad received an information that the present appellant wearing white shirt and black trouser was selling packets of brownsugar near the western edge of Ellisbridge, Opp. Bhikhabhai Park Gate, Ahmedabad. He, therefore, called two persons as panchas in his office. The panchas were informed about the aforesaid information received by him. A preliminary panchnama was drawn wherein the said information was also reduced into writing. An entry was also made in the station diary about the said information and thereafter, Mr Bava, in company of his companion and panchas, went to the spot in a police vehicle.

3. At the place, regarding which the information was received, the present appellant was found sitting and selling certain packets. He had put on the clothes of the description of which information was received. Therefore, the Police Inspector and other police officials along with panchas went to the said person. At that point of time, the said person tried to run away on seeing the police but the members of the raiding party could catch hold of the said person. An enquiry was made from the said person at which the said person disclosed that his name was Bhupatji Shakaraji Thakore. At that point of time, Police Inspector enquired from him as to he was willing to be searched in presence of a Magistrate, on which the reply given by him was that he was not willing to be searched in presence of a Magistrate. Thereafter, Mr Bava carried out the search of his person in presence of panchas and during the

course of the said search, contraband articles were found in 139 packets. Weighment was taken and it was found to be 7.5.kgs of brownsugar. The said muddamal article was seized and sealed in presence of panchas after following due procedure of law. The appellant was arrested, muddamal article and the appellant were presented to the concerned police station and Mr Bava filed FIR also.

4. On the basis of the said FIR, investigation was carried out, muddamal article was sent to the Forensic Science Laboratory for analysis and after conclusion of the investigation and after the receipt of the reports from the said FSL, charge sheet was filed for the aforesaid offence against the appellant before the court concerned. Initially, the charge sheet appears to have been filed before the Metropolitan Magistrate Court and the case appears to have been committed to the City Sessions Court at Ahmedabad for trial. Learned trial Judge provided the appellant with copies of police investigation papers. Charge at Exh.1 was framed and was read over and explained to the appellant. He pleaded not guilty and therefore evidence was recorded. At the conclusion of evidence, further statement of the appellant was recorded under section 313 of the Code. Arguments were heard and thereafter the learned trial Judge found the appellant guilty for the aforesaid offence. The appellant was heard on the point of quantum of punishment and thereafter, the learned trial Judge inflicted the aforesaid punishment on the appellant. Feeling aggrieved by the said judgment and conviction order of the trial court, the appellant has preferred this appeal before this court.

5. The appellant has contended before this court that before the search could be carried out, proper procedure as laid down in section 50 of the Act was not followed. That the evidence of the prosecution before the trial court was quite insufficient, that the person who was brought as witness for carrying out the weighment of the muddamal article, had come for the said purpose in the past also and, therefore, he was a man of police and, therefore, his evidence could not be treated to be trustworthy and could not be relied upon. That the panchas have not supported the case of the prosecution and, therefore, the trial court ought not to have relied upon the sole testimony of the police witness. That on the whole, the judgment and conviction order of the trial court are illegal and perverse and it deserves to be set aside. It has also been contended before this court that though the searching officer had made an offer to the appellant as to whether he desired to be searched in

presence of a Magistrate, it was not conveyed to the appellant by Mr Bava that it was the right of the appellant to opt in whose presence he should be searched. That the said right was not conveyed to the appellant and, therefore, there was apparent violation on the part of Mr Bava and, therefore, the trial has been vitiated and the appellant deserves acquittal.

6. The appellant has, therefore, prayed that the present appeal may be allowed, the judgment and conviction order recorded by the trial court may be set aside, the appellant may be acquitted of the offence in question and he may be set at liberty forthwith.

7. The appeal was admitted at the first instance and it was placed for hearing. Today when the matter was called out, the appeal was argued by Mr D R Dave, learned Advocate appointed by the Legal Aid Committee and Mr K C Shah, learned APP appeared for the State. They have taken us through the evidence on record and through the observations made by the trial court during the course of the judgment.

8. As said above, the prosecution has come out with a case that on account of a previous information, Mr Bava, concerned Police Inspector, had gone to the spot to carry out the search. It was also the case of the prosecution that the appellant was sitting and selling brownsugar and, therefore he was apprehended and during the course of his search, brownsugar was seized from his person. He was arrested and panchnama was drawn. FIR was filed and the appellant was presented to the concerned police station. In order to prove the aforesaid facts, the prosecution has examined the following witnesses before the trial court:

1. PW 1 Exh.11 - Indrajit J Dantani, Panch witness
2. PW 2 Exh.12 - Liyakat Dosani, witness who had taken weighment of mudamal
3. PW 3 Exh.14 - Waksinh M Rajput, co-panch
4. PW 4 Exh.16 - Gokalbhai Ramabhai, Head Constable, who had received the muddamal article and handed it over to Dilipsingh
5. PW 5 Exh.18 - Dilipsingh Juvansingh, Police Constable who carried the muddamal to the FSL
6. PW 6 Exh.19 - Joseph John Christian, Panch witness
7. PW 7 Exh.20 - Manharprasad Patel, P.I, Narcotic Cell, Member of raiding party
8. PW 8 Exh.22 - Akbarmiya Saiyed, who registered the offence
9. PW 9 Exh.25 - Balwantsingh Rathod, Police Head

Constable
10.PW 10 Exh.27 - Kantipuri Chhaganpuri Bava, P.I., informant and Searching Officer

The prosecution has also produced certain documents which may be enlisted as follows:

1.	FIR of Mr K C Bava Exh. 32
2.	Report of PSO Exh. 34
3.	Panchnama regarding recovery of muddamal Exh. 28
4.	Yadi to FSL Exh. 35
5.	FSL report-Guj.version Exh. 35 and Exh.21
6.	Entry in the station diary and report Exh.29
7.	Presentment of the appellant/ report by Asstt.Commissioner of Police Exh.33
8.	Panchnama prepared after the pre-liminary examination of muddamal by FSL Exh.36
9.	Intimation to the Asstt.Commissioner of Police Exh.30
10.	Ground of arrest of the accused Exh.31
11.	FSL despatch note Exh.37
12.	Receipt of FSL report Exh.38
13.	FSL report Exh.39
14.	Certificate showing weighment of muddamal Exh.13
15.	Entry in the muddamal register Exh.17
16.	Entry made in police station diary regarding information received Exh.24
17.	Entry showing the registration of crime Exh.26

9. As said above, Mr Bava, Police Inspector has been examined at Exh. 27 before the trial court in order to prove the case of the prosecution. The said witness has tendered his oral testimony before the trial court at Exh.27, page 87. He has deposed that he had received the aforesaid information on 10.12.1995 when he was on duty at about 3 p.m. That the information was that a person named Bhupatji Thakore wearing white bush shirt and black trouser was selling contraband article near the western end of Ellisbridge, Opposite Bhikhabhai Garden. That therefore, two panchas were invited and they were conveyed about the information and thereafter preliminary panchnama was drawn and the aforesaid information was reduced into writing. That entry was made in the police station diary regarding the said information. That a

report was placed before PSO also. The witness has further said that thereafter he, along with the panchas and other police officers, went to the aforesaid spot where a person with the aforesaid clothes was found selling some articles. That therefore, they all went to the said person and on seeing the police, the said person tried to run away. He was apprehended and on enquiry it was found that it was the same person as described by the informant. That before his search was carried out, enquiry was made from him if he wanted to be searched in presence of a Magistrate. That the appellant declined to be searched before a Magistrate and, therefore, his search was made by Mr Bava. That during the said search, brown sugar was seized from his person and weighment was taken by calling the witness for the said purpose. That the said muddamal was seized and sealed and panchnama was drawn to that effect. That thereafter, muddamal and the appellant were presented to the police station, FIR was also filed. This is the evidence given by the said witness. Now the record shows that the said P.I. was cross examined at great length by the learned Advocate for the present appellant before the trial court. On going through the said lengthy cross examination, we find that the evidence of the witness has not been shaken to any extent. This shows that the witness had stood test of cross examination. Various questions were put to him regarding the initial enquiry, the witness has stuck to his case that offer was made to the appellant for his search before a Magistrate. An attempt was also made to show that seal was not properly applied on the muddamal and the witness has not agreed to the said suggestion. Looking to the answers given by the said witness during the course of cross examination, we are of the view that the evidence of this witness has not shaken to any extent and, therefore, also we find that the trial court was justified in depending upon the evidence of this witness. Looking to the nature of the evidence tendered by him, this witness appears to be dependable.

10. So far as the other witnesses are concerned, we can find that the two panchas have turned hostile and, therefore, it would not be necessary to deal with the evidence of those witnesses at length. It is sufficient to say that panch witness Indrajit Dantani at Exh.11 and panch witness Waksingh Rajput at Exh.14, both have turned hostile. Therefore, their evidence does not support the case of the prosecution. Since they have been treated hostile, the prosecution can argue that their evidence may be overlooked. Then there is evidence of PSI, Manharprasad Patel at Exh.20 who is working as Police Sub-Inspector in the Narcotic Cell. He had accompanied

P.I. Mr KC Bava at the said raid. His evidence is almost in conformity with the evidence of Mr Bava. He has fully supported and corroborated the oral testimony of Mr Bava. This witness was also cross examined at length. However, even evidence of this witness has not been shaken to any extent and, therefore, he has also stood test of cross examination and there is no reason to discard the evidence tendered by this witness. It is also required to be considered that the evidence of these two witnesses has been supported by the FIR and panchnama referred to hereinabove. FIR was filed without any loss of time and the panchnama was drawn right on the spot. It is well settled that if the panchas do not support the case of the prosecution, then, in that event, case of the prosecution is not required to be thrown away. In all cases, evidence on record is required to be weighed on its own footing. Simply Mr Bava and Mr Patel are police officers, it does not mean that their evidence should be discarded. Here we find that their evidence is supported by other evidence also. This evidence includes FIR and panchnama. It is also required to be considered that this evidence is in accordance with the information which was reduced into writing in the form of information received by Mr Bava before proceeding for the raid in question. Even considering the total weight of muddamal article, we find that there is no reason to discard the evidence of these two witnesses. The theory of planting of muddamal has to be rejected. Once the evidence of these two witnesses is found acceptable, dependable and reliable, then it is required to be held further that the prosecution has proved that the muddamal in question was actually found from the person of the appellant.

11. Then we can also consider the evidence of Gokulbhai at exh.16 who was working as writer-Head Constable. He had received the muddamal article and had handed over the same to Constable Dilipsingh for being carried to the FSL. His evidence did not meet with a serious searching and cross examination. Constable Dilipsingh Exh.16 has deposed that he took the muddamal to the FSL and obtained the receipt. He has produced at Exh.17 the entry from the muddamal register and he has identified his signature therein. He has also deposed before the trial court that the muddamal article was in sealed condition when he received the same. It was again in the sealed condition when he handed over the same to the FSL. This shows that the muddamal article was in a sealed condition all throughout till it reached the hands of FSL. Therefore, it cannot be said that there was any possibility of playing any mischief with the muddamal

article at any point of time. Joseph John Christian, Exh. 19 has been examined by the prosecution as panch in whose presence the search of the house was carried out. This witness does not support the case of the prosecution and, therefore, he has been treated hostile. However, nothing was found from the house of the appellant and, therefore, his evidence becomes unnecessary for any purpose. Akbarbhai Saiyed at Exh.22 was working as Head Constable at the relevant point of time. According to his evidence he had received a written report regarding the information received by Mr Bava and he had reduced the same into writing in police station diary at page 33. He produced and proved the said entry. This shows that the information received by Mr Bava was actually reduced into writing by this witness in police station diary. Head Constable Mr Balwantsingh Rathod at Exh.25 is a witness who had received the FIR, panchnama and muddamal. He had also received custody of the appellant. He has identified the appellant before the trial court also.

12. The above facts clearly go to show that there was ample and quite sufficient evidence before the trial court to hold that the appellant was found in possession of brown sugar. At least two witnesses have given full version about the same on oath before the trial court and as said above, their evidence was found to be reliable and dependable and their evidence inspired confidence. In that view of the matter, the trial court was justified in relying upon the evidence of the said two witnesses and in holding that the prosecution had proved before the trial court that the appellant was found in possession of brown sugar. Admittedly, the appellant did not have any pass, permit or licence for possessing the same and, therefore, he possessed the same in contravention of the said enactment and committed the said offence for which the appellant has been convicted.

13. Learned Advocate for the appellant had taken up a contention that when the appellant was searched by Mr Bava, the only offer made to him was as to whether he wanted to be searched in presence of a Magistrate. It is also his argument that under section 50 of the Act, there should be two offers first as to whether the appellant wanted to be searched in presence of a Magistrate and the second as to whether the appellant wanted to be searched in presence of a Gazetted Officer of the department as mentioned in Section 42 of the said act. Learned Advocate for the appellant has argued that the the only option given to the appellant was restricted to the search before a Magistrate only. That it was not an

offer or option made to the appellant as to whether he wanted to be searched in presence of a Gazetted Officer of a particular department. That therefore, the trial would stand vitiated as it is well settled that the provision of section 50 of the Act are mandatory and non-compliance thereof should result in acquittal of the accused person. Section 50 of the said Act may be reproduced for ready reference :

"50. Conditions under which search of persons shall be conducted - (1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41 and 42 or section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by any one excepting a female."

It is also an admitted position that Mr Bava had made an offer to the appellant if the appellant wanted to be searched in presence of a Magistrate. This would clearly show that the offer was not made to him as to whether he wanted to be searched in presence of a Gazetted Officer of a concerned department. Therefore, according to the argument of the learned Advocate for the appellant, two offers were not made and two options were not given to the appellant and, therefore, there is contravention of section 50 of the Act which is mandatory and non-observation or violation thereof should result in the acquittal of the accused person. However, when the matter was argued in past before a Bench comprising of Hon'ble Messers Justice A M Kapadia and H H Mehta, the point as aforesaid was raised by the learned Advocate for the appellant and the said Bench found that this was a

fit case wherein the matter may be referred to a larger Bench. Accordingly a Full Bench consisting of Hon'ble Messers R K Abichandani, RP Dholakia and A L Dave was constituted. The said Bench heard the learned Advocate for the appellant and Mr S N Shelat, learned Advocate General with Mr A Y Kokje, concerned learned APP for the respondent State and after hearing them at length, the said Full Bench of this Court considered the said question referred to the said Bench and decided the matter by pronouncing the judgment on 24.4.2003. Following issue was raised before the said Full Bench: -

> "Whether the option offered to the accused to ascertain his willingness to be searched in presence of a Magistrate without referring to be searched in presence of a Gazetted Officer or vice versa would amount to non-compliance of the provisions envisaged under section 50 of the NDPS Act ?"

After hearing the learned Advocates for the parties and considering all the decisions shown to the said Bench by the learned Advocates for the parties, the said Full Bench of this Court has given an answer to the said question referred to the said Bench at page 20 of the said judgment as follows:

> "We hold that asking the suspected person, while explaining that he was about to be searched, whether he would require the search to be made before a Magistrate is sufficient intimation to him of his right under section 50 of the Act and amounts to due compliance of the mandatory requirement of section 50, even if while asking, the authorized officer referred only to a Magistrate and not to a Gazetted Officer, or, vice versa. The question referred is answered accordingly."

14. The aforesaid decision of the Full Bench of this Court makes it clear that asking a suspected person, before he may be about to be searched, whether he would require the search to be made before a Magistrate is sufficient information to him of his right under section 50 of the Act and amounts to due compliance of the mandatory requirement of section 50, even if, while so asking, the concerned officer refers only to a Magistrate and not to a Gazetted Officer, or vice versa.

15. This would mean that according to the decision of the Full Bench of this Court, even if the offer is made

regarding search of a suspected person in presence of a Magistrate, then it would fully comply with the requirement of section 50 of the Act. In other words, it was not necessary for Mr Bava to enquire from the appellant as to whether he wanted to be searched in presence of a Magistrate or whether he wanted to be searched in presence of a Gazetted Officer of a concerned department or he was willing to be searched in presence of Mr Bava himself. In view of the aforesaid decision of the Full Bench of this Court, we find that when Mr Bava had made an offer to the appellant and enquire from him as to whether he wanted to be searched in presence of a Magistrate, it was sufficient compliance of section 50 of the Act and the requirement of section 50 of the Act would stand complied with and satisfied despite the fact that other two alternative options were not put to the appellant. Therefore, it cannot be said that the appellant would be entitled to acquittal on account of non-observations of the mandatory requirement of section 50 of the act.

15. Another argument advanced by the learned Advocate for the appellant is that Mr Bava was required to further inform the appellant before a search was carried out, that it was the right of the appellant to be searched in presence of a Magistrate or in presence of a Gazetted Officer of a concerned department. Incidentally, the aforesaid issue was also discussed by the said Full Bench of this Court in this matter and the Full Bench of this Court has also decided that it is sufficient to enquire from a suspected person as to whether he wanted to be searched in presence of a Magistrate and it was not imperative, obligatory or mandatory on the part of the concerned police officer to inform the appellant that it was his right of being searched in presence of a Magistrate or a Gazetted Officer of a concerned department.

16. In support of the aforesaid contention, learned Advocate for the appellant has relied upon a decision in the case of Vinod v. State of Maharashtra, reported in (2002) 8 SCC 381. It was also shown by him to the said Full Bench of this court and after considering this decision, the said Full Bench of this Court has decided that Mr Bava was not required to inform the appellant that it was his right of being searched in presence of a Magistrate. In this connection, we may also refer to a decision of the Apex Court in the case of Joseph Fernandez v. State of Goa, reported in (2000) 1 SCC 707. In para 2 of the said judgment, the Apex Court has observed that it must be remembered that the Searching

Officer had only section 50 then in mind unaided by the interpretation placed on it by the Constitution Bench. That even then the searching officer informed him that "If you wish you may be searched in the presence of a Gazetted officer or a Magistrate." That this is in substantial compliance with the requirement of section 50 of the Act. The Hon'ble Supreme Court did not agree with the contention that there was non-compliance with the mandatory provision contained in section 50 of the Act. In that view of the matter, it is not possible for us to agree with the contention raised by the learned Advocate for the appellant that there was again non-compliance with the provision made in section 50 of the Act.

17. In other words, simply because Mr Bava did not inform the appellant that it was his right of being searched in presence of a Magistrate or a Gazetted Officer of a concerned department but when he simply asked the appellant if he wished to be searched in presence of a Magistrate then also, there would not be violation of section 50 of the Act, but this question or inquiry would satisfy the mandatory requirement of section 50 of the act in substance and spirit.

18. It has also been contended that the witness who was called to take weighment of the muddamal article, was a witness who had come for the said purpose once in past also and, therefore, his evidence could not have been accepted by the trial court. The said witness Liyakt Dosani has been examined as PW 2 at Exh.12.

19. Now, it has to be considered that this witness has been examined only for the purpose of proving that weighment of muddamal article and also for the purpose of weighment was taken with the aid of this witness. So far as the search, seizure and recovery of the muddamal article are concerned, it has no bearing with the evidence of this witness. In other words, the evidence of this witness is not material for the purpose of appreciating the case of the prosecution with respect to search, seizure and recovery of the muddamal. Therefore, even if the witness had come for the second time for taking weighment of the muddamal seized from the appellant, then also it cannot be said that the case of the prosecution is not proved as the witness was called as a witness for taking weighment of muddamal in past also. After all for the purpose of weighment, persons in the neighbourhood having weighing machine or scales, are required to be invited. It is not necessary that different persons may be invited as witnesses on different occasions for the said purpose. Evidence of

this witness, as said above, was not for the purpose of proving the fact of search, seizure and recovery of muddamal article from the appellant. Therefore, even if the witness had come for the second time, that would not lead us to hold that the evidence of the prosecution and the case of the prosecution are not free from doubt. In that view of the matter, it is not possible for us to agree with the argument of the learned Advocate for the appellant that the evidence of the prosecution and the case of the prosecution are not free from doubt. We are, therefore, unable to agree with the argument of the learned Advocate for the appellant that in view of the aforesaid position, the appellant is entitled to a benefit of reasonable doubt. Taking the matter from all corners and from all angles, we are of the view that there was sufficient material and evidence before the trial court - both oral and documentary in order to prove that the muddamal brownsugar was seized from the person of the appellant and there was also evidence before the trial court that the muddamal article seized from the appellant was proved to be brownsugar and hence it was contraband narcotic drug. Admittedly, the appellant did not possess any pass, permit or licence for possessing such narcotic drug. Therefore, apparently he committed offence with which he was charged and the offence for which he has been convicted by the trial court. The trial court had sufficient evidence before it and it appreciated the same in a correct manner. Each and every witness and his evidence has been considered at length by the trial court. Therefore, when the assessment and appreciation of evidence before the trial court are proper and when the trial court is not found to have committed any error in appreciating the evidence on record, even in our opinion, there is no reason to dislodge the said finding of the trial court based on cogent and convincing reasons after due and proper appreciation of evidence on records.

20. In above view of the matter, we are in full agreement with the reasonings and findings arrived at by the trial court. In that view of the matter, it was not very much necessary for us to give detailed reasons for dismissing the appeal of the appellant. However, looking to the nature of the offence and looking to the quantum of punishment inflicted on the appellant and considering the maximum punishment provided in law, we felt it our duty to see that the relevant contentions are dealt with in accordance with law and, therefore, we made efforts to deal with them in little detail. Any way, we find no substance or merit in the present appeal and, therefore, the appeal deserves to be dismissed.

21. For the foregoing reasons, this appeal is dismissed. The judgment and conviction order recorded by the trial court and confirmed.

8.5.2003 [D P Buch, J.]

[H H Mehta, J.]

msp